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U.S. Citizenship
and Immigration
Services

FILE: EAC 02 060 53883 Office: VERMONT SERVICE CENTER

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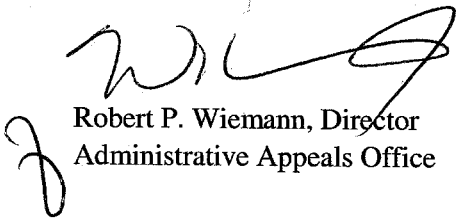
IN RE: Petitioner:
Beneficiary:

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner claims to be engaged in the business of manufacturing and selling diamonds, precious stones, and jewelry. It seeks authorization to employ the beneficiary temporarily in the United States as its international marketing manager. The director determined that the petitioner had not established that the beneficiary has been and would be employed in a managerial or executive capacity. On appeal, counsel disputes the director's findings and submits additional descriptions of duties for the beneficiary and his partners in the foreign entity.

To establish L-1 eligibility under section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L), the petitioner must demonstrate that the beneficiary, within three years preceding the beneficiary's application for admission into the United States, has been employed abroad in a qualifying managerial or executive capacity, or in a capacity involving specialized knowledge, for one continuous year by a qualifying organization and seeks to enter the United States temporarily in order to continue to render his or her services to the same employer or a subsidiary or affiliate thereof in a capacity that is managerial, executive, or involves specialized knowledge.

The regulations at 8 C.F.R. § 214.2(l)(3)(v) state that if the petition indicates that the beneficiary is coming to the United States as a manager or executive to open or to be employed in a new office in the United States, the petitioner shall submit evidence that:

- A) Sufficient physical premises to house the new office have been secured;
- B) The beneficiary has been employed for one continuous year in the three year period preceding the filing of the petition in an executive or managerial capacity and that the proposed employment involved executive or managerial authority over the new operation; and
- C) The intended United States operation, within one year of the approval of the petition, will support an executive or managerial position as defined in paragraphs (l)(1)(ii)(B) or (C) of this section, supported by information regarding:
 - (1) The proposed nature of the office describing the scope of the entity, its organizational structure, and its financial goals;
 - (2) The size of the United States investment and the financial ability of the foreign entity to remunerate the beneficiary and to commence doing business in the United States; and
 - (3) The organizational structure of the foreign entity.

The U.S. petitioner filed its Certificate of Incorporation in the state of New York in October 2001 and claims to be a subsidiary of Premji Valji & Sons, a partnership firm located in India. The petitioner seeks to employ the beneficiary in the United States for an initial stay of one year at an annual salary of \$38,000.

At issue in this proceeding is whether the petitioner has established that the beneficiary has been employed abroad and would be employed in the United States in a managerial or executive capacity.

Section 101(a)(44)(A) of the Immigration and Nationality Act ("the Act"), 8 U.S.C. § 1101(a)(44)(A), provides:

The term "managerial capacity" means an assignment within an organization in which the employee primarily-

- i. manages the organization, or a department, subdivision, function, or component of the organization;
- ii. supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- iii. if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- iv. exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), provides:

The term "executive capacity" means an assignment within an organization in which the employee primarily-

- i. directs the management of the organization or a major component or function of the organization;
- ii. establishes the goals and policies of the organization, component, or function;
- iii. exercises wide latitude in discretionary decision-making; and
- iv. receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

In regard to the beneficiary's proposed duties in the United States, the petitioner stated that the beneficiary would, "establish & direct the growth of a U.S. subsidiary company which will be importing & wholesaling diamonds, precious stones & metals and jewelry." Regarding the beneficiary's duties abroad, the petitioner

stated that the beneficiary has been "planning & directing marketing & sales efforts in international markets." No further details were given in regards to either of the beneficiary's positions.

On January 8, 2002, the director issued a request for additional evidence instructing the petitioner to provide comprehensive descriptions of the beneficiary's duties, both abroad and in the United States. In regard to the beneficiary's employment with the foreign company, the petitioner was instructed to identify the company's employees by name and position title, and to submit an hourly breakdown of each employee's duties, including the beneficiary. The petitioner was asked to provide the same information in regard to its own proposed personnel structure, including an hourly breakdown of the beneficiary's job duties.

The petitioner's response included the following description of the beneficiary's current and proposed duties:

[The beneficiary] has served as our marketing and sales manager since 1987. He has traveled extensively and he is thoroughly familiar with our foreign customers and the foreign markets for Indian finished diamonds, especially those in the United States. He has surveyed and studies the markets for our products abroad, conferred with customers and potential customers, on their requirements as to quality, size and cost of goods, planned and directed the selection of goods for sales presentation abroad, and directed the fulfillment of orders and the production of special orders. He sets and revises prices based on his knowledge of our costs and market demand. He negotiates supply contracts with major customers, including payment and credit terms, and shipping and delivery schedules. He also retains the services of customs house brokers and reviews and assesses their work for us.

To develop new products and product lines, he consults with, and oversees the work of our designer [The beneficiary] monitors this design and specification work to assure that customers' requirements will be met, and to guarantee that he will have products that will sell well in the market

[The beneficiary] also has a staff of eight sales, service and fulfillment personnel working under him [The sales supervisor] supervises the activities of the sales personnel and assigns personnel to service particular customers and orders. [The beneficiary] oversees [the sales supervisor's] work and plans and organizes and schedules the fulfillment of orders based on contract commitments and availability of goods. [His] duties are exclusively managerial in our organization.

In New York we are planning to have [the beneficiary] set up and organize a United States sales and service office, which we believe will enable us to expand sales in the United States and in North America. He will also be continuing in his role as the marketing and sales manager of our entire international organization, overseeing the designer and the sales supervisor and his staff. We expect that within a few months [the beneficiary] will have a local sales supervisor who will in turn hire two or three sales and service workers and/or sales representatives working on a commission basis. We also expect to employ a bookkeeper and an administrative assistant to handle the office paperwork. [The beneficiary], with the assistance of his support staff in India, and the personnel in the New York office, will plan and organize the U.S. sales and marketing operation based on his knowledge and continuing study of the market in America, and the costs and availability of products in India. He will

coordinate the fulfillment of orders from American customers and the creation of an inventory of jewellery [sic] and precious stones by directing the activities of our sales supervisor and designer in India, as well as consulting with our purchasing and production manager on issues such as quality control and schedules.

The petitioner also submitted a list of the foreign company's employees, identifying each individual by name and position title. Further, in an effort to illustrate the foreign entity's personnel structure, the petitioner submitted an organizational chart. The chart indicates that the beneficiary's position is at the top of the organizational hierarchy, second only to the managing partner. The beneficiary's immediate subordinates include a sales supervisor, who supervises a staff of sales people and service clerks, and a jewelry designer, who has no subordinate employees. The petitioner did not provide hourly breakdowns of duties either for the beneficiary or his subordinates. The director noted this deficiency in his denial and concluded that the descriptions of the duties of the petitioner's employees were too vague to provide the director with a comprehensive understanding of what these individuals are actually doing and whether the beneficiary's immediate subordinates can be deemed managerial, supervisory, or professional employees. The director determined that the petitioner failed to establish that the beneficiary's duties abroad and his proposed duties in the United States would primarily be of a managerial or executive nature.

On appeal, counsel asserts that the previously submitted job descriptions for the beneficiary and his subordinates were sufficient. Nevertheless, counsel includes supplemental job descriptions as a result of the director's finding that the descriptions previously submitted were insufficient. While the petitioner submits the previously requested hourly breakdowns of the beneficiary's duties, as well as the duties of his subordinates overseas, the AAO must note that the petitioner failed to submit this evidence when initially requested. The regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. *See* 8 C.F.R. § 103.2(b)(12). The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). As the petitioner was put on notice of required evidence and given a reasonable opportunity to provide it for the record before the visa petition was adjudicated, the AAO will not consider this evidence on appeal for any purpose. *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988). The appeal will be adjudicated based on the record of proceeding before the director.

In general, whether the beneficiary is a managerial or executive employee turns on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial or executive. *See* sections 101(a)(44)(A) and (B) of the Act. Here, the petitioner fails to document what proportion of the beneficiary's duties would be managerial functions and what proportion would be non-managerial. The petitioner lists the beneficiary's duties as including both managerial and operational tasks, but fails to quantify the time the beneficiary spends on them. This failure of documentation is important because several of the beneficiary's daily tasks, such as conducting market research, providing customer service, and negotiating contracts, do not fall directly under traditional managerial duties as defined in the statute. For this reason, the AAO cannot determine whether the beneficiary's job abroad involves primarily managerial duties. *See IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

Further, although the beneficiary is not required to supervise personnel, if it is claimed that his duties involve supervising employees, the petitioner must establish that the subordinate employees are supervisory, professional, or managerial. *See* § 101(a)(44)(A)(ii) of the Act. In the instant case, the beneficiary's subordinates abroad include one supervisory employee and one other employee who is the company's jewelry

designer. In the description of the beneficiary's job duties, the petitioner indicated that a significant portion of the beneficiary's job involves supervising the jewelry designer. As such, a determination must be made as to whether that individual can be deemed a professional employee.

In evaluating whether the beneficiary manages professional employees, the AAO must evaluate whether the subordinate positions require a baccalaureate degree as a minimum for entry into the field of endeavor. Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), states that "[t]he term *profession* shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." The term "profession" contemplates knowledge or learning, not merely skill, of an advanced type in a given field gained by a prolonged course of specialized instruction and study of at least baccalaureate level, which is a realistic prerequisite to entry into the particular field of endeavor. *Matter of Sea*, 19 I&N Dec. 817 (Comm. 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966).

Therefore, the AAO must focus on the level of education required by the position, rather than the degree held by the subordinate employee. The possession of a bachelor's degree by a subordinate employee does not automatically lead to the conclusion that an employee is employed in a professional capacity as that term is defined above. In the instant case, the petitioner has not, in fact, established that an advanced degree is actually necessary to design jewelry. Therefore, the AAO cannot conclude that the beneficiary primarily manages a staff of managerial, supervisory, or professional employees.

On review, the record as presently constituted is not persuasive in demonstrating that the beneficiary has been and would be employed in a primarily managerial or executive capacity. The record indicates that a preponderance of the beneficiary's duties have been and would be directly providing the services of the business. As previously stated, the petitioner has not demonstrated that the beneficiary will be primarily supervising a subordinate staff of professional, managerial, or supervisory personnel, or that he has been and will be relieved from performing non-qualifying duties. Although the foreign entity appears to have a sufficient sales staff to actually sell the company's product, the responsibility of marketing, which cannot be deemed a qualifying duty, falls entirely on the beneficiary. Based on the evidence furnished, it cannot be found that the beneficiary has been and would be employed primarily in a qualifying managerial or executive capacity. For this reason, the petition may not be approved.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.